Office of Chief Counsel
Internal Revenue Service

memorandum

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JTLortie

date: Dec 24, 2002

to: Terry Davis, Disclosure Officer

from: JOHN T. LORTIE
Senior Attorney (SBSE)

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subject: **Advisory Opinion-Disclosure of Appeals Coordinator's Documents**

This is in response to your request of January 24, 2002 in which you are requesting our advice as to whether any Freedom Of Information Act (FOIA) exemptions would apply to preclude the disclosure of various documents and statistics compiled by the Appeals Coordinator for Family Limited Partnerships.

ISSUES

Whether any FOIA Exemptions would apply to preclude the disclosure of the documents listed below which have been compiled by the Appeals Coordinator for Family Limited Partnerships?

CONCLUSIONS

The following is our recommendation as to whether the documents should be released or withheld:

1. 4 Pages of Statistical Information - To the extent that any of these pages contain tax return information, they should not be disclosed. Specifically, pages 3 and 4 identify particular audits and should not be disclosed. Similarly, pages 1 and 2 should not be disclosed as they reveal the Appeals settlement guidelines which may be exempted under 5 U.S.C. § 552(b)(7)(E).

2. Appeals Information Paper -FLP - This document should be withheld under 5 U.S.C. § 552(b)(5) as an intra-agency memorandum which reveals advice rendered by the FLP coordinator (who is an attorney) to her client (Estate and Gift Tax attorneys and fellow appeals officers).

3. IRM 8.7.1.6.10 - This document should be released in full without any redaction as the Internal Revenue Manual is open to public disclosure.

4. Appeals Coordination of FLP Cases - This document should be withheld under 5 U.S.C. § 552(b)(5) as an intra-agency memorandum which reveals advice rendered by the FLP coordinator (who is an attorney) to her client (Estate and Gift Tax attorneys and fellow appeals officers).

5. Information Pertaining to Settled Cases - This document should be withheld under 5 U.S.C. § 552(b)(3) as it reveals confidential tax return information.

FACTS

The Appeals Coordinator for Family Limited Partnerships has been gathering statistics of the ranges of settlements of family limited partnership cases. The Service has entered into various settlements with taxpayers who have created family limited partnerships. These settlements vary based on the facts and circumstances of each case and generally involve discounts for lack of marketability and control of the various partnership interests. In some cases, no discount was allowed at all. The coordinator has canvassed a number of Estate and Gift Tax Attorneys and Appeals officers throughout country and compiled various documents showing the range of settlements reached in these cases. These documents included statistical and methodological information regarding taxpayers who have utilized the Appeals process for settlement of their cases.

The release of this information may have nationwide impact since a number of family limited partnerships are under currently under audit throughout the country. The practitioner community has become aware that these statistics are being compiled and a practitioner has now filed a FOIA request for this information. You are now seeking our views as to which of these documents may be exempted from disclosure under FOIA, if any.

ANALYSIS

The Freedom of Information Act ("FOIA") codified at 5 U.S.C. § 552(a)(3)(A), directs that federal agencies promptly make available records requested and reasonably described. *See* Rugiero v. Department of Just., 257 F.3d 534 (6th Cir. 2001). In that case, citing Air Force v. Rose, 425 U.S. 352 (1976), the court referred to "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language."

I. **FOIA EXEMPTION: (b)(3)**

Section 552(b) of FOIA allows exemption of materials that fall within one of nine categories. Section 552(b)(3) exempts disclosure of material specifically exempted by statute. In the context of cases concerning the Service, this section is often invoked to deny FOIA requests that pertain to taxpayer information. Under 26 U.S.C. § 6103(a) and the flush language following that section, tax returns and return information shall not be disclosed. Section 6103(b)(1)-(2) defines such material as information or tax returns containing a taxpayer's identity, information pertaining to a taxpayer's income, assets, liabilities, and so on.

Disclosure of such information was addressed in Church of Scientology of California v. IRS, 484 U.S. 9 (1987). In that case, the Court addressed the § 6103(b)(2) exception, known as the "Haskell Amendment" which requires that to qualify for exception from disclosure, such information must tend to "identify, directly or indirectly, a particular taxpayer."

The last clause of the Haskell Amendment removes from exemption, information "in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer." The Church of Scientology argued that the Haskell Amendment removes from exemption, information "in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer." The Church argued that the amendment's language required the Service to release the material with such information redacted. The Court held that the Haskell Amendment does not require the service to redact taxpayer information and release the remaining material. The Court further stated that such redaction of identifying material would not remove the underlying information from the disclosure exemption provided in § 6103(b).

The Court cited the Seventh Circuit decision in King v. IRS, 688 F.2d 488 (7th Cir. 1982), where the court found that the last clause of the Haskell Amendment was intended to allow the Service to disclose statistics compiled in a manner that does not identify taxpayers. This allowance does not mandate redaction and reconfiguration of data in a manner that will not reveal taxpayer identities or return information. Such information must be withheld, § 6103 is an exempting statute and its mandate is not discretionary in nature. *See* Aronson v. IRS, 973 F.2d 962 (1st Cir. 1992) *citing* DeSalvo v. IRS, 861 F.2d 1217 (10th Cir. 1988); Grasso v. IRS, 785 F.2d 70 (3d Cir. 1986); *and* Chamberlain v. Kurtz, 589 F.2d 827 (5th Cir.) cert. denied, 444 U.S. 842 (1979).

II. FOIA EXEMPTION: (b)(5)

FOIA provides another exemption from disclosure for inter-

agency or intra-agency memorandums or letters at § 552(b)(5). Two requirements must be met to qualify for (b)(5) exemption: the source must be a government agency, and the information must fall within a privilege against discovery. *See* Department of the Interior & Bureau of Indian Affairs v. Klamath Water Users Protective Assoc., 532 U.S. 1 (2001).

When qualified to use the (b)(5) exemption, such material is covered by privileges which include: the attorney-client privilege, the attorney work product privilege, and the deliberative process privilege. *See* Rugiero v. Department of Just., 257 F.3d 534 (6th Cir. 2001). "The exemption ensures that members of the public cannot obtain through FOIA what they could not ordinarily obtain through discovery undertaken in a lawsuit against the agency." Schiller v. NLRB, 964 F.2d 1205 (D.C. Cir. 1992).

The attorney-client privilege applies to facts disclosed by a client to his or her attorney as well as opinions the attorney renders based upon the facts communicated. *See* Brinton v. Department of State, 636 F.2d 600 (D.C. Cir. 1980), reh'g denied, December 9, 1980, cert. denied, 425 U.S. 905 (1981), *and* Green v. IRS, 556 F. Supp. 79 (N.D. Ind. 1982), aff'd mem., 734 F.2d 18 (7th Cir. 1984).

ATTORNEY-CLIENT PRIVILEGE

Successful assertion of the attorney-client privilege requires meeting four elements. The party must establish (1) he or she sought to be a client of the attorney; (2) that the attorney in connection with the document in question, acted as a lawyer; (3) that the document relates to facts communicated for the purpose of securing a legal opinion, legal services or assistance in a legal proceeding; and (4) that the privilege has not been waived. *See* Maine v. United States Department of Interior, 124 F. Supp. 2d 728, 740 (D. Me. 2001).

Federal courts have protected written communications from attorneys to clients to "ensure against the inadvertent disclosure, either directly or by implication, of information which the client has previously confided to the attorney's trust." *See* Maine, at 740 quoting Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980).

WORK PRODUCT PRIVILEGE

The work product privilege protects documents prepared in anticipation of litigation. The work product privilege includes the working papers and documents of government attorneys and recognizes the rule that such documents are shielded from

disclosure as was established in Hickman v. Taylor, 329 U.S. 495 (1947). *See* Kaiser Aluminum & Chemical Corp. v. U.S., 287 F.2d 890 (1961) *cited in* NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975).

It is not necessary to be in the process of litigation for the exemption to apply. However, specific claims must have been identified for the work product exemption to apply. *See* Maine, at 744 *and* Kent Corp. v. NLRB, 530 F.2d 612, 624 (5th Cir. 1976), cert. denied, 429 U.S. 920 (1976).

In Kent, various labor practice charges had been filed. The attorney wrote a report regarding the pending litigation and later made notations regarding which charges to pursue. The petitioner sought disclosure of the document. The court found that the reports requested under FOIA were "not primary information, such as verbatim witness testimony or objective data, but rather are mainly reports on how the Birmingham attorneys appraised the evidence they found." The court then stated that such materials, when prepared anticipating litigation or trial, are always protected by the work product privilege.

Schiller v. NLRB, 964 F.2d 1205 (D.C. Cir. 1992) the court, *citing* Delaney, Migdail & Young, Chartered v. IRS, 826 F.2d 124, 127 (D.C. Cir. 1987), found that documents "prepared in anticipation of foreseeable litigation, even if no specific claim is contemplated" are exempted from disclosure by the work product privilege.

Documents subject to the work product privilege may contain factual components and the attorney's legal analysis. Circuits have split regarding whether the privilege exempts both the factual and analytical components of documents sought. *See* Martin v. Office of Special Counsel, 819 F.2d 1181, 1184-87 (D.C. Cir. 1987) *and* Robbins Tire & Rubber Co. v. NLRB, 563 F.2d 724 (5th Cir. 1977), *rev'd on other grounds*, 437 U.S. 214 (1978). (Both cited in Maine at 744.) According to Maine, the majority of circuit courts have endorsed segregating and releasing factual portions of the documents.

DELIBERATIVE PROCESS PRIVILEGE

The deliberative process privilege protects predecisional, nonfactual material. The issue was addressed in NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975). In that case, the Court found that this protection was intended to foster the decision making power of governmental agencies and to encourage the open discussion of legal issues. Failure to offer such protection could impair the process and stifle frank discussion of legal issues.

See EPA v. Mink, 410 U.S. 73, 86-87 (1973) *and* U.S. v. Weber, 465 U.S. 792, 802 (1984).

Two requirements must be met to claim the deliberative process privilege. "First, the document must be prepared prior to a final decision in order to assist an agency decisionmaker in arriving at his decision. Second, the document must be a direct part of the deliberative process in that it makes recommendations or expresses opinions in legal or policy matters." *See* Town of Norfolk v. United States Army Corps of Engineers, 968 F.2d 1438, 1458 (1st Cir. 1992), *citing* Nadler v. U.S. Dept. of Justice, 955 F.2d 1479, 1490-91 (11th Cir. 1992).

As stated, this protection extends only to predicisional, nonfactual material. In Montrose Chemical Corp. v. Train, 491 F.2d 63 (D.C. Cir. 1974), it was established that factual material was not protected by the deliberative process privilege unless the facts were so "intertwined" with the material that disclosure would reveal the deliberative process.

Upon adoption and use of the material by an agency, the material becomes agency "working law" and is subject to disclosure. *See* Taxation With Representation Fund v. IRS, 646 F.2d 666, 677 (D.C. Cir. 1981) *and* Ginsberg v. IRS, 81 A.F.T.R.2d (RIA) 1031 (MD Fla. 1997) *and* Sears at 152, 153, 155-156 (where the court held the release of formerly predecisional material was appropriate upon disposition of the matter as the information had become agency "working law").

Widespread dissemination of the material may lead to an inference of adoption and destroy privilege protections. Dissemination may breach the attorney-client privilege. However, communication between employees of an agency does not necessarily breach confidentiality and destroy the privilege. *See* Mead Data Central Inc. v. Department of the Air Force, 566 F.2d 242, 243 n. 24 (D.C. Cir. 1977) *and* Upjohn v. United States, 449 U.S. 383 (1981) (where the court recognized that communications by employees to corporate counsel fell within the attorney-client privilege. Despite this expansion, the extent of dissemination is critical to maintaining the privilege).

Communications to or with employees and personnel with authority to act or speak for the agency or corporation regarding the privileged material is appropriate. *See* Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) *citing* Mead, at 253 n. 24. Communications beyond that group breach confidentiality and the attorney-client privilege no longer applies.

Information disseminated in a manner that could be perceived as instructions to employees of an agency or corporation, is not protected by the attorney-client or deliberative process exemptions. Intent that the instructions be followed may be inferred by subsequent conduct in conformity with the instructions. *See* Afshar v. Department of State, 702 F.2d 1125 (D.C. Cir. 1983).

A finding that the material has been adopted may additionally remove the protection provided by § 552(b)(3). Upon finding the material had become "working law" of the agency, a court could order redaction of taxpayer information and release of the remaining material. *See* Taxation With Representation Fund v. IRS, 646 F.2d 666, 677 (D.C. Cir. 1981) *and* Tax Analysts & Advocates v. IRS, 505 F.2d 350, 353 (D.C. Cir. 1974) (where the court observed that statements of policy and interpretation not exempted by (b)(3) must be disclosed).

III. FOIA EXEMPTION (b)(7)(E)

Section 552(b)(7)(E), exempts from disclosure records or information compiled for law enforcement purposes where disclosure "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." *See* Becker v. IRS, 34 F.3d 398 (7th Cir. 1994).

In Church of Scientology Int'l v. IRS, 995 F.2d 916, 919 (9th Cir. 1993), the court observed that the Service had the requisite law enforcement purpose and could invoke the (b)(7)(E) exemption in appropriate circumstances. Application of the exemption is well illustrated. Court decisions have consistently supported exemption of discriminant function scores, ("DIF scores"), which are used to select returns for audit, may be withheld. In Buckner v. IRS, 25 F. Supp. 2d 893, 898 (N.D. Ind. 1998), the court held that "release of this information could compromise the integrity of the IRS and its regulatory function by allowing individuals to manipulate their DIF scores and possibly avoid a well-deserved audit."

Information regarding tolerance and criteria has been deemed to constitute information compiled for law enforcement purposes. Courts have found it appropriate to withhold such information as its release could interfere with the enforcement of internal revenue law. *See* O'Connor v. IRS, 698 F. Supp. 204 (D. Nev. 1988) *and* Ferguson v. IRS, 1990 U.S. Dist. LEXIS 15293 (N.D. Cal., Oct. 31, 1990) (the court held that it was appropriate to withhold dollar tolerances and math error codes used to review, process, and examine returns). The latter decision was criticized in Tax Analysts v. IRS, 152 F. Supp. 2d 1 (D.D.C. 2001).

Application to the Instant Case

1. 4 Pages of Statistical Information

Of the four pages of statistical information, pages 1 and 2 concern appeals guidelines and are exempted from disclosure under § 552(b)(7)(E). As discussed above, the Service has the requisite law enforcement purpose and may invoke (b)(7)(E) when release of the information may compromise the integrity of the Service and its regulatory function.

Pages 3 and 4 identify specific audits and which were compiled using taxpayer information. Section 6103 mandates that this information must not be disclosed. Therefore, § 552(b)(3) applies and the information is exempted from disclosure by statute.

2. Appeals Information Paper -FLP

The Appeals *Information Paper regarding FLP's* should be withheld under § 552(b)(5). Given that the paper discusses hazards of litigation, and is essentially an intra-agency memorandum, there is a strong argument that the work product privilege applies. Alternatively, an argument could be made that the work is subject to the attorney-client privilege.

3. IRM 8.7.1.6.10

The information sought from the Internal Revenue Manual should be released in full.

4. Appeals Coordination of FLP Cases

The appeals coordination information should be withheld under § 552 (b)(5). The information is an intra-agency memorandum where the appeals coordinator, an attorney, is rendering advice to her client, other attorneys and officers in the agency.

5. Information Pertaining to Settled Cases

The information pertaining to settled cases is based entirely on taxpayer information. As such, § 552(b)(3) applies and the § 6103 mandate prohibits release of the material.

To date, the FOIA request concerns the materials discussed above. Subsequent data that has been compiled is not subject to this particular request. The date of the request serves as the cut-off date for release of information. Documents generated after the date the request is made are not subject to release. Courts have found that imposition of another time limit would impose an undue burden on agencies complying with FOIA requests. *See* Judicial Watch v. Clinton, 880 F. Supp. 1, 24 (D.D.C. 1995) *citing* Church of Scientology v. IRS, 816 F. Supp. 1138, 1148 (W.D. Tex. 1993).

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NOTED:

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